

State of Colorado



Bill Owens
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State Personnel Board
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AGENDA PUBLIC BOARD MEETING October 17, 2006

A public meeting of the State Personnel Board will be held on **Tuesday, October 17, 2006, at the Colorado State Personnel Board, 633 17th Street, Suite 1400, Denver, Colorado 80202-3604.** The public meeting will commence at 9:00 a.m.

Reasonable accommodation will be provided **upon request** for persons with disabilities. If you are a person with a disability who requires an accommodation to participate in this meeting, please notify Board staff at 303-866-3300 by October 12, 2006.

I. REQUESTS FOR RESIDENCY WAIVERS

- A. October 1, 2006 Report on Residency Waivers

Reports are informational only; no action is required.

II. PENDING MATTERS

- A. Department of Public Safety, Colorado State Patrol Intern, State Personnel Board case number 2007R003; Request for Residency Waiver.

On August 25, 2006, the Board received a request for a residency waiver for positions classified as Colorado State Patrol Intern. On September 11, 2006, the Director issued a notice granting the residency request for a period of two years. On September 21, 2006, an amendment to the September 11, 2006 notice was issued by the Director.

III. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES ON APPEAL TO THE STATE PERSONNEL BOARD

- A. Timothy Bennett v. Department of Corrections, State Personnel Board case number 2003B150(C).

Complainant, a Life/Safety officer, appealed the abolishment of his position and subsequent retention rights, and asserted a claim of age discrimination. Complainant also appealed a disciplinary action which had resulted in the assessment of a \$300 per month permanent base pay reduction. Complainant additionally grieved a number of events, including a corrective action, a decision to place him on administrative leave while there was an investigation into whether he had improperly taken state property from the facility, a detention at the facility after he and his wife entered the grounds while he was on administrative suspension, and a "needs improvement" performance review.

Complainant also filed a whistleblower complaint associated with a number of his grievances.

After hearing, the ALJ found that Respondent's layoff procedure was contrary to rule or law in that it failed to apply Board rules requiring that the agency use time bands to determine seniority of employees and that employees in the more junior time bands are to be laid off first. The ALJ found nothing arbitrary, capricious or contrary to rule or law in the procedure Respondent had used to determine Complainant's retention rights. The ALJ rejected Complainant's age discrimination claim on the grounds that Complainant's replacement by a man six months his junior did not constitute a *prima facie* case of age discrimination as a matter of law, that there was no persuasive evidence that age played a role in Respondent's decision-making, and that Complainant presented insufficient evidence of a disparate impact on the basis of age. As for the disciplinary action, the ALJ found that Complainant had committed three of the four asserted acts, but that a permanent base pay reduction constituted punishment without end, which quickly leads to a disproportionate punishment for the violations. The ALJ reduced the penalty to \$300 per month for six months. The ALJ found that, with one exception, Complainant had failed to show that any of the actions he grieved constituted actions which were arbitrary, capricious, or contrary to rule or law, and that he did not sufficiently demonstrate that any of the actions alleged were retaliatory for any disclosures that he had made. The ALJ found that a reference, in the corrective action, to the violation of a DOC regulation on misstatements was not founded on any of the behavior addressed in the corrective action, and that reference should be removed from the corrective action. Finally, the ALJ found that Respondent's interpretation of the Board's layoff rules so that Respondent had eliminated the fundamental protection of seniority for state employees constituted a sufficiently strained and unreasonable interpretation of the Board rules and case law as to fall into the category of a bad faith interpretation of the rules. The ALJ awarded attorney fees and costs for the litigation of the abolishment issue, and rejected Respondent's request for an award of fees and costs against Complainant.

On June 1, 2006, the Administrative Law Judge issued the Initial Decision of the Administrative Law Judge. On June 8, 2006, the ALJ issued an Amended Initial Decision of the Administrative Law Judge.

Post ID Procedural History: On September 22, 2006, Respondent filed its Opening Brief of Respondent Department of Corrections, and Complainant filed Complainant's Opening Brief on Cross-Appeal and a motion requesting that he be permitted to submit his Opening Brief in excess of the page limitation (10 pages) specified in Board rule. On September 26, 2006, the Board's Director ruled that Complainant was permitted to submit his Opening Brief in excess of the page limitation (12 pages). On September 28, 2006, the parties submitted a Joint Motion to Correct the Administrative Record, alleging that there are stipulated exhibits which are missing from the record. On October 2, 2006, Complainant filed Complainant's Answer Brief and Respondent filed Answer Brief of Respondent Department of Corrections to Complainant's Cross Appeal. On October 5, 2006, the ALJ issued a List of Stipulated Exhibits. On October 5, 2006, the Board's Director issued an Order Re: Joint Motion to Correct Administrative Record, setting forth the procedure which will be used to supplement the certified record by adding the missing stipulated exhibits referenced in the parties' joint motion, removing exhibits which were neither offered nor admitted but were in the certified record, and adding exhibits which were admitted but not in the certified record.

IV. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES TO GRANT OR DENY PETITIONS FOR HEARING

- A. Sharon Carbaugh v. Board of Trustees for the University of Northern Colorado, State Personnel Board case number 2007G008.

Complainant, an Information Technology Professional I (IT Prof I) at the University of Northern Colorado (UNC), received a promotion from an Information Technology Technician II to Complainant's current position, but did not receive a raise in pay. Complainant argues that she is entitled to back pay, plus interest, including the percent of difference for Pay for Performance based on what her salary would have been, had she received a raise in pay at the time of the payment of Pay for Performance, plus interest and a percent of difference for salary survey, plus interest for each year.

Respondent argues that the Board does not have jurisdiction to grant Complainant a pay increase and that Complainant's grievance was untimely; thus, the Board cannot review the final grievance decision. Respondent argues that Complainant has not met her burden of showing an evidentiary and legal basis that would support a finding that UNC's action was arbitrary, capricious or contrary to rule or law because Complainant has always been paid within the range for an IT Prof I.

On September 20, 2006, the Administrative Law Judge issued a Preliminary Recommendation recommending that Complainant's petition for hearing be denied.

B. James Thomas v. Department of Human Services, Disability Determination Services, State Personnel Board case number 2006G007.

Complainant, a Materials Handler I, employed by the Department of Human Services, Disability Determination Services, filed a petition for hearing on August 11, 2006, upon receipt of an adverse grievance decision. Complainant asserts that his supervisor, Ms. Garrity, discriminated against him by denying him equal overtime opportunities and that he was never provided with a career track training, which would allow him to advance in the organization. Complainant argues that he had been treated poorly due to his race, African American, and that he has been unfairly rated on his last performance evaluation, on the basis of his race. Complainant's relief requested in his grievance was 200 hours of overtime pay, an end to the racial discrimination, removal from Ms. Garrity's supervision, removal of the negative statement on his evaluation, and participation in the Career Track Training Program.

Respondent asserts that Complainant's arguments are moot, in part, since the career track training program had been abandoned and that Complainant had a new supervisor since July 2005. Respondent argues the Board does not have jurisdiction to address the issues Complainant grieved regarding his Performance Management and Pay and that Complainant's claims are not covered under the Colorado Anti-Discrimination Act, because he has not suffered a deprivation as defined by the Act, and because Complainant failed to prove a *prima facie* case of race discrimination.

On October 5, 2006, the Administrative Law Judge issued a Preliminary Recommendation recommending that Complainant's petition for hearing be denied.

V. **INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES**

A. Cynthia Hernandez v. Department of Revenue, State Personnel Board case number 2006G047 (September 27, 2006).

Complainant, an administrative assistant, appealed her disciplinary termination during the probationary period by Respondent, alleging discrimination against her on the basis of race and national origin and seeking reinstatement. After hearing, the ALJ found that Complainant failed to establish a *prima facie* case of intentional discrimination and that the preponderance of evidence demonstrated that Complainant had ongoing problems performing at a level required of the position, particularly in the areas of customer service

and responsiveness to supervisory directives via email. In conclusion, the ALJ determined that Respondent presented sufficient evidence demonstrating a legitimate business reason for terminating Complainant and affirmed the termination, dismissing Complainant's appeal with prejudice.

VI. REVIEW OF THE MINUTES FROM THE SEPTEMBER 19, 2006 PUBLIC MEETING OF THE STATE PERSONNEL BOARD

VII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS SEPTEMBER 19, 2006 PUBLIC MEETING:

- A. Darlana J. Clements v. Department of Regulatory Agencies, Division of Insurance, State Personnel Board case number 2007G001.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and to deny the petition for hearing.

- B. Robert W. Murray v. Department of Corrections, State Personnel Board case number 2006G073.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and to deny the petition for hearing.

- C. Jeff Hotchkiss v. Department of Corrections, State Personnel Board case number 2007G003.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and to deny the petition for hearing.

VIII. REPORT OF THE STATE PERSONNEL DIRECTOR

IX. ADMINISTRATIVE MATTERS & COMMENTS

A. ADMINISTRATIVE MATTERS

- Cases on Appeal to the Board and to Appellate Courts
- Mandate/Order Affirmed in Barron v. Department of Labor & Employment, Office of Field Operations, State Personnel Board case number 2004B088, Court of Appeals No. 05CA0021
- Order Reversed and Case Remanded with Directions, Clementi v. Department of Corrections, State Personnel Board case number 2003B159, Court of Appeals No. 05CA0577
- Mandate/Dismissed in Jones v. Department of Corrections, Rifle Correctional Facility, State Personnel Board case number 2003B082, Court of Appeals No. 05CA1891

B. OTHER BOARD BUSINESS

- Staff Activities

C. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS, PERSONNEL ADMINISTRATORS, AND THE PUBLIC

X. PROPOSED LEGISLATION AND/OR RULEMAKING

RULEMAKING

The Board's Notice of Rulemaking was issued on August 18, 2006, and published in the Colorado Register on September 10, 2006. The proposed rules and the proposed statement of basis and purpose have been available for review at the Board office as well as on the Internet since September 11, 2006. Testimony and comments regarding proposed amendments to the Board Rules will be taken at this meeting. The public testimony and comment portion of the rulemaking hearing is open. The purpose of the Rulemaking proposed for October 17, 2006, is to adopt amendments to Board Rules, for the general clarification for the public and efficient management of the Board, as follows:

- (1) Board Rule 1-5, changing the requirement from eight copies of all materials to nine copies of all materials;
- (2) Board Rule 1-67, changing the definition of Retirement to include all state retirement plans;
- (3) Board Rule 2-13, changing the citation to rule from 1-19B to Board Rule 1-19;
- (4) Board Rule 6-15, changing the requirements for a written notice of disciplinary action to include the time frame for an appeal of the disciplinary action, and the Board's address, telephone and facsimile numbers for filing the appeal;
- (5) Board Rule 8-19, changing the citation to rule from 8-18B to Board Rule 8-18;
- (6) Board Rule 8-23, amending the requirement that the agency submit an original and one copy of its response to the Whistleblower complaint;
- (7) Board Rule 8-25, deleting the rule in its entirety to conform to statute by deleting the procedure relating to referral to the Personnel Director for investigation of the allegations of Whistleblower violations;
- (8) Board Rule 8-26, deleting the rule in its entirety to conform to statute by deleting the procedure relating to referral to the Personnel Director for investigation of the allegations of Whistleblower violations;
- (9) Board Rule 8-27, amending the rule to include the time line for a hearing;
- (10) Board Rule 8-28, deleting the portion of the rule referring to the outcome of any Whistleblower investigation;
- (11) Board Rule 8-29, deleting the rule in its entirety to conform to statute by deleting the procedure relating to referral to the Personnel Director for investigation of the allegations of Whistleblower violations;
- (12) Board Rule 8-30, amending the reference to appeal to clarify the inclusion of appeals of selection decisions;
- (13) Board Rule 8-43, deleting the reference to Director's website from the rule;
- (14) Board Rule 8-50(C), deleting the reference to Whistleblower investigations;
- (15) Board Rule 8-50(D), deleting the reference to Whistleblower investigations;
- (16) Board Rule 8-53(B), changing the citation to rule from 6-10B to 6-10;

(17) Board Rule 8-64(C), changing the citation to rule from Rule 8-39B to Board Rule 8-39.

XI. EXECUTIVE SESSION

- A. Case Status Report
- B. Minutes of the September 19, 2006 Executive Session
- C. Other Business

XII. WORKING SESSION

- Discussion of proposals for Business Plan

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NEXT REGULARLY SCHEDULED BOARD MEETINGS - 9:00 a.m.

November 21, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
December 19, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
January 16, 2007	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
February 20, 2007	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
March 20, 2007	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
April 17, 2007	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
May 15, 2007	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
June 19, 2007	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604